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Moresi: Protecting Individual Rights Through the Louisiana Constitution

Mindy L. McNew

NOTES

Moresi: Protecting Individual Rights Through the Louisiana Constitution

I. INTRODUCTION

In recent years, a growing number of individual rights advocates have turned their hopes of securing substantial protection of fundamental rights from the U.S. Constitution to the constitutions of the fifty states.[1] This renewed emphasis on state constitutional interpretation is born primarily out of the U.S. Supreme Court's conservative interpretation of the Bill of Rights.[2] The current majority, as was the case with the Burger Court before it, has limited the avenues of redress for an individual whose rights have been infringed. They have done so by narrowly defining the scope of the protections offered by the U.S. Constitution[3] and by limiting an individual's constitutional private right

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1. *See generally* Jennifer Friesen, *Recovering Damages for State Bill of Rights Claims*, 63 Tex. L. Rev. 1269 (1985).

2. The Burger Court, led by Chief Justice Warren Burger, was the first court in recent history to appear truly "hostile" to any expansion in the protections provided by the U.S. Constitution. *See* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 505 (1985). When the Burger Court first began limiting the Constitution, previously persuasive commentators of the 1950s and 1960s who had argued for expansion of the "state action" limit on the constitution seemed to give up the idea of securing real protection from the document. Now, with a similar conservative approach by the present majority, commentators advocating expanded constitutional protections have reappeared. *See* Friesen, *supra* note 1, at 1271.

3. The scope is being narrowed in (1) who has the rights, (2) how claims for violations of those rights may be brought and against whom, and (3) the substance of the protections.

"[T]he source of all constitutional rights is the written Constitution, and . . . the language of the document protects rights only from interference by the state." *See* Chemerinsky, *supra* note 2, at 520, defining the positivist approach to constitutional protections. Also, *see, e.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 160 n.10, 98 S. Ct. 1729, 1735 n.10 (1978), where Justice Rehnquist clearly relies on this positivist approach. Also, Justice O'Connor considered in Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460 (1988), that the presence of a government program suggests that Congress believes it has provided adequate remedies and therefore no private cause of action for damages under the Constitution exists. In so holding, the Court never actually discussed what remedies were available. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 Va. L. Rev. 1117, 1124 (1989), discussing judicial willingness to defer to

of action by holding that the power to grant such an action lies solely within the legislative domain.[4] As a result, law professors, judges, and practitioners have begun to urge state courts to do what the federal judiciary has declined to do—"put teeth"[5] in their own constitutions by ensuring that the rights granted therein will be meaningfully upheld.

In *Moresi v. Department of Wildlife & Fisheries*,[6] the Louisiana Supreme Court was faced with a claim for individual protection based on the state constitution. In that case, which involved alleged unreasonable searches, seizures, and invasions of privacy by agents of the Department of Wildlife and Fisheries, the court indicated its support for this emerging emphasis on state constitutional protection of individual rights by holding for the first time that a violation of article I, section 5 of the Louisiana State Constitution[7] gives rise to a private cause of action. The court also indicated for the first time that those protections go beyond limiting "state action" and apply directly to prohibit such invasions of privacy by private, non-government parties. While the plaintiff's claim in *Moresi* was ultimately denied on the merits, the significance of that decision is that its language indicates the willingness of the

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Congress.

Another method of narrowing the scope offered by constitutional protections is the doctrine of qualified immunity. Qualified immunity is an attempt to reconcile two competing interests. It is designed to permit aggrieved individuals to seek redress for violations of their constitutional rights while at the same time protecting federal officials from the inhibiting effect such suits can bring. The injured party's right to redress disappears if the official violating his rights was acting in "good faith." *See* Perry M. Rosen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 349 (1989).

4. Justice Rehnquist wrote in his dissent in Carlson v. Green, 446 U.S. 14, 31-54, 100 S. Ct. 1468, 1478-90 (1980), that "absent a clear indication from Congress, federal courts lack the authority to grant damages relief for constitutional violations" and that these causes of action lie within the legislative domain. *Id.* at 41, 100 S. Ct. at 1483. That reasoning appeared somewhat in Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404 (1983), where the Court denied a *Bivens* remedy to a federal employee who filed suit under the First Amendment, because Congress occupied the area by a comprehensive procedural and substantive program.

5. *See* Rosen, *supra* note 3, at 338 (discussing *Bivens*); John M. Harlow, Comment, California v. Acevedo*: The Ominous March of a Loyal Foot Soldier*, 52 La. L. Rev. 1205 (1992).

6. 567 So. 2d 1081 (La. 1990).

7. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

La. Const. art. I, § 5.

Louisiana Supreme Court to grant recovery for such claims. The possibility of a Louisiana "constitutional tort"[8] through article I, section 5, as well as such actions being available against private conduct, holds great promise for advocates of the protection of individual rights through state constitutions.

The Louisiana Supreme Court's showing of support for the "constitutional tort" and the elimination of the "state actor" requirement with regard to certain provisions of the state's constitution is by far not a first on the state court level. Several other states have adopted these approaches to their own constitutions.[9] But despite the enthusiasm of advocates and the apparently broad acceptance in state courts, many criticize the ideas themselves,[10] and some question the courts' ability to effectively implement them.[11]

This casenote will argue that despite those uncertainties, the Louisiana courts can and should continue down the path indicated in *Moresi*. Specifically, in Part I this casenote will discuss the facts and holding of the Louisiana case along with *Bivens v. Six Unknown Named Federal Narcotics Agents*,[12] which marked the U.S. Supreme Court's first recognition of the "constitutional tort." Part II will discuss the development of the constitutional tort in both the federal and state legal systems and will further examine the authority of the Louisiana Supreme Court to grant such an action. This section also will discuss several problems facing the implementation of the "*Bivens*" doctrine such as the use of the "special factors" exception[13] discussed by Justice Brennan in the

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8. This principle was first seen in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971).

9. Some of the states adopting all or part of these doctrines include California, New Jersey, Mississippi, Illinois, Massachusetts, and New York. Also, refer *infra* to notes 58-67 and 103-112 and accompanying text for more discussion of these states.

10. In Jacobs v. Major, 407 N.W.2d 832, 840 (Wis. 1987), Wisconsin's supreme court reasoned that "[t]o turn what was a prohibition of governmental acts into positive rights against other private persons is not logical nor historically established." *See also* SHAD Alliance v. Smith Haven Mall, 488 N.E.2d 1211 (N.Y. 1985), Jennifer Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?*, 17 Hastings L.Q. 111, 116 (1989), and John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 Rutgers L.J. 820 (1990), for discussions of the elimination of the "state action" limit.

11. *See* Devlin, *supra* note 10, at 825 ("The underlying concern appears to be that if courts abandon threshold requirements of state action there will be no principled means to prevent 'constitutionalization' of an unacceptably broad range of private law and private relationships"). *See also* Rosen, *supra* note 3, for a discussion of the obstacles facing the fulfillment of the *Bivens* doctrine.

12. 403 U.S. 388, 91 S. Ct. 1999 (1971).

13. *Id.* at 396, 91 S. Ct. at 2005. Brennan wrote, "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."

case. Part III of this casenote will follow the development of the "state action" limitation in constitutional interpretation and will discuss how many state courts have begun to read sections of their own constitutions as providing broader protections to the individual. The section also will discuss the basis of such an expansion of the Louisiana Constitution and will examine the arguments made against such expansion. In Part IV, the casenote will recommend how the state legislature can ensure the stability of the constitutional tort while also satisfying the critics by enacting a statute which creates and defines a cause of action for violations by both private and state actors of specific provisions of the Louisiana Constitution. Although legislation would be the best and most effective approach to guaranteeing greater individual rights, this casenote concludes that until the legislature speaks on the issue, the courts of Louisiana must embrace *Moresi* and the promises it holds for individual rights in this state.

II. *BIVENS* AND *MORESI*

Part of the action brought in *Moresi* was based on the Louisiana Constitution. This allowed the Louisiana Supreme Court to address the possibility of a private right of action based on provisions of the constitution. In so doing, the court focused on the *Bivens* case of 1971 in which the U.S. Supreme Court first recognized a private right of action in the U.S. Constitution. Before discussing the *Moresi* decision, it is essential to discuss the Supreme Court's decision in *Bivens* to grant recovery under the Fourth Amendment.

A. Supreme Court Recognition

In *Bivens*, the U.S. Supreme Court was faced with the issue of whether the Fourth Amendment provided an individual the right to recover money damages for violations of its protections. On November 26, 1965, Webster Bivens was sitting at home with his wife and children when six federal agents allegedly entered his apartment without a warrant and conducted a search. When the search ended, the agents arrested Bivens and placed him in manacles. Both the search and the arrest allegedly were conducted with excessive force.[14] After being placed under arrest, Bivens was booked, interrogated, and subjected to a visual strip search at the federal courthouse in Brooklyn. As a result of these events, Bivens brought a civil action in federal court claiming he suffered great humiliation, embarrassment, and mental suffering. He sought $15,000 in damages from each of the agents and based his civil claim upon the Fourth Amendment.[15]

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14. *Id.* at 389, 91 S. Ct. at 2001.

15. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

The district court in New York dismissed the action based on a lack of subject matter jurisdiction and for want of a claim upon which relief could be granted.[16] The Second Circuit Court of Appeals found that the district court had subject matter jurisdiction over the case, but affirmed that court's decision in that the plaintiff needed a federal statutory right in order to recover money damages for the agents' conduct.[17] In reaching its decision, the Second Circuit said, "The view that statutory authority is a prerequisite for a federal cause of action for damages, even though the wrong complained of is the violation of a constitutional right, has been adopted by all of the courts which have examined this question recently."[18] The court continued, saying that the "medium contemplated [for the violations Bivens complained of] was . . . the common law action of trespass, administered in our judicial system by the state courts."[19] The Fourth Amendment's place in the scheme, according to the Second Circuit, was simply a limit on the agents' defense that their actions were authorized by the national government. The Supreme Court granted certiorari on the case in order to address the Fourth Amendment issue.[20]

Writing for the majority, Justice Brennan rejected the Second Circuit's characterization of the Fourth Amendment as merely a limit on the agents' defense in a state tort action. In finding a right of action in the Fourth Amendment, Justice Brennan placed substantial importance on the disparity of power that existed between the government agents involved and private citizens. He wrote, "An agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own."[21] That disparity of power, Brennan reasoned, justifies the right of a private citizen to bring a cause of action against federal officers for violations of the Fourth Amendment. These "constitutional torts" recognized by the Court have since been called *Bivens* actions.

> no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

16. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 276 F. Supp. 12 (N.Y. D.C. 1967), *affirmed*, 409 F.2d 718 (2d Cir. 1969), *rev'd and remanded*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

17. *Bivens*, 409 F.2d at 718.

18. *Id.* at 720.

19. *Id.* at 721.

20. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, *cert. granted*, 399 U.S. 905, 90 S. Ct. 2203 (1970), *rev'd and remanded*, 403 U.S. 388, 91 S. Ct. 1999 (1971).

21. *Bivens*, 403 U.S. at 392, 91 S. Ct. at 2002.

Brennan found the Court's authority to grant such a right of action by establishing jurisdiction based on the Court's decision in *Bell v. Hood*.[22] In *Bell*, the plaintiff sought damages against the Federal Bureau of Investigation for an illegal arrest, false imprisonment, and unlawful searches and seizures. The Court found the claim was a controversy arising under the Constitution of the United States within the meaning of 28 U.S.C. § 1331,[23] thus the lower court had subject matter jurisdiction. According to the Court, the power to hear *Bell*, as well as *Bivens*, was founded upon the existence of federal question jurisdiction to the extent that the Constitution provides a substantive right to be free from unreasonable searches and seizures at the hands of federal authority.[24]

Once Justice Brennan found federal question jurisdiction, he took the next step and said it was the Court's duty to provide enforcement of the protections found in the Constitution and that the Court had the inherent power to fashion appropriate remedies for such enforcement. The Fourth Amendment, Brennan wrote, is a right that, absent factors "counselling hesitation," deserves protection by the Supreme Court.[25]

After concluding that Bivens deserved the protection of the federal court and that the federal courts have the authority to grant such protection, Justice Brennan discussed the validity of enabling Bivens to be compensated for his injuries through damages in a civil action. The Court conceded that the language of the Fourth Amendment did not expressly provide for its enforcement by an award of money damages; however, Justice Brennan concluded that when a "federal statute provides for a general right to sue . . . federal courts may use any available remedy to make good the wrong done."[26]

B. Louisiana's Recognition

While the facts of *Moresi* are not as dramatic as those in *Bivens*, they did provide the Louisiana Supreme Court an opportunity to discuss the *Bivens* doctrine and its application to our state constitution. On January 11, 1986, four agents from the Department of Wildlife and Fisheries were stationed at Stelly's Landing in Vermillion Parish to watch for game violators. It was the final day of the duckhunting season, and the agents had received a tip that a hunter would be transporting illegally

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22. 327 U.S. 678, 66 S. Ct. 773 (1946).

23. "The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988).

24. *Bivens*, 403 U.S. at 392, 91 S. Ct. at 2002 (citing Bell v. Hood, 327 U.S. 678, 66 S. Ct. 773 (1946)).

25. *Id.* at 396, 91 S. Ct. at 2005.

26. *Id.*, 91 S. Ct. at 2005 (citing *Bell*, 327 U.S. at 684, 66 S. Ct. at 777.

taken ducks via the landing. As part of the investigation, the agents decided to check all boats coming into the landing.[27]

After a full day of duckhunting, eighteen-year-old Patrick Damas Moresi and twenty-one-year-old Kern Alleman approached Stelly's Landing carrying equipment and supplies, as well as a large number of slain ducks and a large ice chest (all fully visible on their mudboat). When the hunters reached the landing, one of the agents boarded the vessel, inspected the slain ducks and, after asking the hunters what the ice chest contained, opened the chest. The agent also searched the life preserver compartment of the boat. In the course of these inspections, the agents found several untagged ducks (a violation of federal law).[28]

After searching the boat, the agents took the hunters back to the Moresi and Alleman Camp two miles away to ensure that the hunters were not using the tags as a ruse to smuggle out a stockpile of ducks. While at the camp, an agent lifted the lid of an empty ice chest sitting in front of the camp and glanced inside. After discussing the tagging violations with the fathers of the two hunters, the agents returned the hunters to Stelly's Landing and issued citations for violating the federal game laws and regulations.[29]

As a result of the searches, two young duck hunters and their fathers filed suit against the four game agents for violation of 42 U.S.C. § 1983,[30] article I, section 5 of the Louisiana Constitution,[31] and Louisiana Civil Code article 2315.[32] The trial court rendered judgment in favor of the plaintiffs and awarded actual damages of $43,000,[33] punitive damages of $4,000, and attorneys' fees of $32,939.10. The court concluded that

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27. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1083 (La. 1990).

28. *Id.* at 1083, 1089 (regarding the tagging requirements).

29. The final incident involved in the case occurred more than a month later. Moresi and Alleman returned to the camp to find a business card of a wildlife enforcement officer with an inscription on its back: "We missed you this time but look out next time." Through discussions and correspondence between the department and the fathers, it was discovered that the business card was intended for another camp and was left at the Moresi-Alleman camp by mistake. *Moresi*, 567 So. 2d at 1084.

30. Every person, who under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

42 U.S.C. § 1983 (1965).

31. *See supra* note 7.

32. "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. Civ. Code art. 2315. This claim was rejected by the court because the plaintiffs failed to show physical injury, illness, or other physical consequences resulting from the mistake of the agents. The court held that the agents' acts were not intentional, outrageous, or related to another tort and that the injuries were not sufficiently severe to allow recovery. *Moresi*, 567 So. 2d at 1095-96.

33. Patrick Damas Moresi and his father were given $10,000 each in actual damages

the agents did not have reasonable cause to detain the hunters or to conduct any of the searches or seizures. On appeal, the third circuit affirmed the district court's judgment.[34] The case was then appealed to the Louisiana Supreme Court, which reversed and dismissed the plaintiffs' suit based on its finding of qualified immunity. The supreme court discussed the plaintiffs' three claims individually; however, this casenote will focus on the court's analysis of the two claims based on § 1983 and article I, section 5 of the Louisiana Constitution.

1. The § 1983 Claim

To state a claim under § 1983, a plaintiff must allege and prove that conduct occurred under color of state law and that this conduct deprived him or her of a right, privilege, or immunity secured by the Constitution or a law of the United States. The cause of action is directed at actions by state officials only.[35] Therefore, a plaintiff's toughest obstacle in a 1983 action often is overcoming the qualified immunity of the state official.[36] The Supreme Court has ruled that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights . . . ."[37]

Writing for the majority in *Moresi*, Justice Dennis found that the wildlife agents' conduct clearly occurred under the color of state law but was within the performance of their discretionary functions. Regarding the stop and the "brief" detention of Moresi and Alleman, the court reasoned that the agents did not deprive the hunters of any right, privilege, or immunity secured by the U.S. Constitution: "[I]n some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity . . . ."[38] The brief stop may be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity or is wanted for past criminal conduct.[39]

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and $1,000 each in punitive damages. Howard Alleman was given $13,000 in actual damages and $1,000 punitive damages, while his parents received $10,000 in actual damages. Moresi v. Department of Wildlife & Fisheries, 552 So. 2d 1259 (La. App. 3d Cir. 1989), *rev'd*, 567 So. 2d 1081 (1990).

34. *Id.*

35. This limitation to § 1983 is one of the primary reasons courts felt compelled to intervene in a *Bivens*-type situation involving federal actors violating the Constitution. Congress had provided a cause of action for violations of the Constitution by state authorities but left the injured party with no action against a federal actor who violated the Constitution.

36. *See supra* note 3.

37. Harlow v. Fitzgerald, 457 U.S. 800, 817-18, 102 S. Ct. 2727, 2738 (1982).

38. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1086 (La. 1990).

39. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

The court found that the agents had been informed that a suspected game violator would be exiting the marsh at Stelly's Landing with a large quantity of illegal game. It was clear that the two young hunters in this case were transporting large quantities of ducks. Consequently, the court held: "Under the circumstances, the agents had a particularized and objective basis for suspecting that the hunters were engaged or had engaged in game violations. The limited purpose of the stop . . . was to question the occupants of the boat about the ducks in their possession."[40]

With regard to the agents' inspection of the ice chest and life preserver compartments, the court applied the doctrine of qualified immunity and found that a "reasonable officer could have believed these inspections to be lawful, in light of clearly established law and the information the searching officers possessed."[41] The court reasoned that because at the time of the searches the law regarding checkpoint or random stops and inspections was unclear, the officers could have believed that their actions did not violate an established right.[42] Therefore, the officers were immune from suit under § 1983.

2. The State Constitutional Claim

The plaintiffs in *Moresi* sought in the alternative to recover damages for violations of their right under article I, section 5 of the state constitution to be secure in their persons and property from unreasonable searches, seizures, and invasions of privacy. Such rights cannot be vindicated through a 1983 action, which merely creates a cause of action against officials of a state who have allegedly violated a right protected by the *federal* constitution or laws. Section 1983 does not enforce the protections of a state constitution. At the time of *Moresi*, as well as today, Louisiana had no statutory equivalent to § 1983 legislatively creating a cause of action for violation of the state constitution; therefore, the court's first step was to discuss whether such a cause of action could be inferred directly under the Louisiana Constitution. Typically, state courts address two subjects when determining whether or not their state constitution provides a cause of action for this type of violation: (1) whether a *Bivens*-type claim exists in any of the state constitutional provisions, and (2) whether there is a requirement for state action before private actions can be commenced to enforce such provisions.[43]

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40. *Moresi*, 567 So. 2d at 1087.

41. *Id.*

42. Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391 (1979). In that case, the officer stopped Prouse for a license check and saw marijuana in the interior of the automobile. Delaware defended the action based on the need for preserving public safety through license and registration checks. The Court held the stop was invalid given the alternative mechanisms available and the incremental contribution such stops have in promoting highway safety. *See also Moresi*, 567 So. 2d at 1087-88.

43. *See* Friesen, *supra* note 1.

To the first question, whether the state constitution implies any *Bivens* type of actions, the Louisiana Supreme Court answered "yes." The court referred to the clear terms of the provision at issue. Justice Dennis cited Professor Hargrave's well-read Declaration of Rights[44] article, which first asserted the affirmative nature of article I, section 5. Hargrave wrote that the article's deliberate placement apart from other criminal procedural provisions was an indication that its intended effect was on non-criminal cases.[45] Also, Hargrave noted that the addition of property and communications to those rights being protected against unreasonable invasions of privacy created a "fertile ground" for development of tort law.[46]

The court listed several sources of its authority for granting a private right of action under article I, section 5 of the Louisiana Constitution: (1) the textual formula of the provision, (2) its history as recorded at the convention, and (3) the similarity of the provision to the Fourth Amendment in the federal Constitution.[47] Article I, section 5, which states in part that "[e]very person shall be secure in his person, property, communications, houses, papers and effects against unreasonable searches, seizures or invasions of privacy," is worded such that it is an affirmative grant of a right to an individual rather than a limit on state authority. It can be argued that the language "no law shall" indicates restrictions on the state. If such language is violated, the state is the focus of corrective measures, i.e., exclusion of evidence or injunction. On the other hand, "every person shall," which is used in article I, section 5, indicates a mandatory, affirmative right for the individual to be secure in his "person, property, communications, houses, papers and effects."[48] Rather than stating the right as a promise to limit what the state "shall" have the power to do, the wording of article I, section 5 implies that the rights are promises to the individual. If that provision is violated, the person whose right was abridged is the focus of the remedy.

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44. *Moresi*, 567 So. 2d at 1091 (citing Lee Hargrave, *Declaration of Rights*, 35 La. L. Rev. 1 (1974)).

45. *See* Hargrave, *supra* note 44, at 20-21.

46. *Id.* at 21. Prior to *Moresi*, the Louisiana court made similar assertions regarding article I, section 5. In *Moresi*, 567 So. 2d at 1092, Justice Dennis cited Jaubert v. Crowley Post-Signal, 375 So. 2d 1386, 1387 n.2 (La. 1983), in which Justice Dixon outlined the federal and state approaches to privacy rights based both on tort and constitutional grounds. In that case, Justice Dixon indicated there was a cause of action under article I, section 5, but directed most of his discussion of the provision toward its application to private conduct. Justice Dixon had cited Trahan v. Larivee, 365 So. 2d 294 (La. App. 3d Cir. 1978), *writ denied*, 366 So. 2d 564 (1979), which denied a radio station's request for disclosure of various officials' job evaluations because it would be an unconstitutional invasion of privacy. This, along with Justice Dixon's approval in *Jaubert*, indicates that article I, section 5 provides an affirmative right against private conduct.

47. *Moresi*, 567 So. 2d at 1092-93.

48. *Id. See also* La. Const. art. I, § 5.

Justice Dennis cited the history of the provision as a source of the court's authority in finding a private cause of action, yet that history is far from express in its support for such an application of article I, section 5. The idea of finding protection for individuals in article I, section 5 was mentioned during the debates, but it was not resolved.[49] It seems that the resolution of that debate was left for another day or perhaps for the judiciary.

A large part of Justice Dennis' discussion of the court's power to grant a right of action under the state constitution parallelled Justice Brennan's discussion in *Bivens*. Both Brennan and Dennis gave special consideration to the allocation of power among individuals and those acting pursuant to government authority. In both cases, the courts reasoned that in cases involving a disparity of power, the citizen has no method of protection other than that provided by the courts.[50] Also, Justice Dennis compared the protections in the Louisiana Constitution with those of the Magna Carta, just as Justice Brennan compared Fourth Amendment protections with those of the Common Law in the *Bivens* opinion. An individual could be granted an action for damages for a violation of the Magna Carta under the Common Law of England. Such a violation was viewed as a trespass.[51] This reasoning was also cited in *Widgeon v. Eastern Shore Hospital Center*,[52] where the Maryland Supreme Court found a right of action under Articles 24 and 26 of the Maryland Declaration of Rights.

As for the second question addressed in *Moresi*, whether there is a state action requirement in order to have a claim for relief under article I, section 5, the court stated in dicta that there is no such requirement.[53] This part of the analysis was not discussed at length because the actors involved in *Moresi* were state agents for the Department of Wildlife and Fisheries. However, Justice Dennis opened the door to tremendous possibilities for individual rights advocates when he wrote in *Moresi* that the absence of "no law shall" in the language of article I, section 5 indicated that its protections reach far beyond limiting only state action.[54]

Although the court did find the plaintiffs could state a claim for damages under the state constitution, the court denied recovery largely for the same reason it denied the plaintiffs' § 1983 damages claim. The

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49. *See infra* notes 135-136.

50. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 391-92, 91 S. Ct. 1999, 2001-02 (1971); Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092-93 (La. 1990).

51. *Moresi*, 567 So. 2d at 1092.

52. 479 A.2d 921, 924 (Md. 1984).

53. *Moresi*, 567 So. 2d at 1092.

54. *Id. See also infra* text accompanying notes 133-142.

defendants, Dennis wrote, were entitled to qualified immunity because they did not violate any clearly established state constitutional right as of January 11, 1986. The plaintiffs contended that *State v. Parms*[55] had established a right against invasions of privacy through motor vehicle checkpoints and that the conduct of the agents at Stelly's Landing was sufficiently similar to such checkpoints as to be in violation of a clearly established right. The court rejected this argument because *Parms* was decided after the incident involving the game agents and because reasonable jurists could disagree as to whether the case is "directly and fully controlling with respect to game agents' stops of sportsmen in the marsh for questioning with respect to possible game or boating violations."[56]

III. CONSTITUTIONAL TORTS

A. Acceptance of the Bivens *Doctrine*

When the Supreme Court in *Bivens* decided to grant a private cause of action under the Fourth Amendment, the idea was not a revolutionary one. Well before 1971, legal scholars had argued that providing a remedy for the violation of a constitutional right is a necessary part of actually providing the protections. Chief Justice Marshall in 1803 believed that it was essential for the proper functioning of government for the courts to provide a remedy for the violation of a vested legal right. Marshall wrote: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits, at any time, be passed by those intended to be restrained?"[57] With *Bivens*, the Supreme Court advanced the writings of Marshall by establishing that the Fourth Amendment was a right that deserved protection by the courts.

When recognizing the right of action, Justice Brennan qualified the right to be protected by stating, "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress."[58] The Court did not indicate what factors might counsel a court to hesitate in granting a remedy for violations of the Fourth Amendment, but the phrase clearly indicates that the Court believed there would be some instances in which such a private action would not be appropriate. It also indicates the Court saw its role as a secondary one whenever Congress had legislated on the particular matter at issue.

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55. 523 So. 2d 1293 (La. 1988).

56. *Moresi*, 567 So. 2d at 1094.

57. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).

58. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396, 91 S. Ct. 1999, 2005 (1971).

Accordingly, resolving this uncertainty has occupied much of the time of both federal and state courts when determining whether there is a right of action in the provision at issue and also whether a private cause of action is appropriate based on the particular violation involved in the case.

1. Federal Courts

Following *Bivens*, the U.S. Supreme Court seemed willing to grant similar causes of action for violation of other federal constitutional guarantees.[59] In a separate but somewhat similar line of cases, the Court was also inclined to grant an implied cause of action from federal statutes. For example, even before *Bivens*, in *J.I. Case Co. v. Borak*,[60] the Court granted a private cause of action for deceptive proxy solicitation in obtaining authorization for corporate action under the Securities Exchange Act of 1934. Although the Exchange Act did not expressly provide for such a claim, the Court found that it was necessary to make the statute's protection of investors effective. The Exchange Act granted the federal district courts jurisdiction over suits to enforce any liability or duty created by its provisions. From this grant of jurisdiction, the Court inferred an obligation to provide a private right to recovery.[61]

Today, the Supreme Court's treatment of implied causes of action from both constitutional and statutory provisions is more deferential to Congress.[62] In *Schweiker v. Chilicky*,[63] the Court discussed whether the

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59. *See* Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264 (1979) (Davis alleged her Fifth Amendment rights were violated when she lost her job with a Congressman merely because she was a woman; the Court granted recovery); Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1988) (mother recovered under the Eighth Amendment for the death of her son in prison).

60. 377 U.S. 426, 84 S. Ct. 1555 (1964).

61. *Id.* at 432-33, 84 S. Ct. at 1559-60.

62. After expressing an apparent willingness to grant a cause of action despite the existence of other applicable federal statutes in *Davis* and *Carlson*, the Court became more reluctant to do so beginning in 1983. Decisions by the Court focused more on the "special factors counselling hesitation," and the Court usually found those factors sufficient to deny a cause of action. In Chappell v. Wallace, 462 U.S. 296, 302, 103 S. Ct. 2362, 2366 (1983), the Court held a constitutional claim could not be maintained because of the unique disciplinary structure of the military and the legislature's activity in the field. The existence of a "comprehensive internal system of justice" made a *Bivens*-type of remedy inappropriate. Also, in Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404 (1983), the elaborate remedial scheme developed by Congress for civil servants was held to prevent a *Bivens* action, despite the absence of attorneys' fees or compensation for alleged emotional and dignitary harms. United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054 (1987), extended the *Chappell* holding to include activity incident to military service. In that case, a former serviceman brought suit for injuries resulting from the administration

improper denial of Social Security disability benefits gave rise to a cause of action for money damages. In holding that it did not, the Court said it would be cautious before expanding *Bivens* to different contexts. The "special factors" discussed by Justice Brennan in the *Bivens* decision were held to include appropriate judicial deference to indications that "congressional inaction has not been inadvertent."[64] While the Court will still hear some *Bivens* claims, this new deference to Congress tends to increase the reliance by individual rights advocates on state courts to recognize such claims based upon state constitutions and statutes.

2. *State Courts*

After the *Bivens* decision, several states began to find implied causes of action under their own constitutions. Many courts and commentators reason that a constitutional provision that does not by its terms require legislative action to become effective or enforceable is "self-executing."[65] In other words, the rights conferred by or the purpose of the provision and its enforcement are intended to be carried out without such legislative enactment. For example, a Florida court in *Schreiner v. McKenzie Tank Lines and Risk Management Services, Inc.*[66] held that article 1, section 2 of the Florida Constitution, which says that "[n]o person shall be deprived of any right because of race, religion or physical handicap," was self-executing because it "sufficiently delineated 'a rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed or protected without legislative enactment.'"[67] The finding that the clause was self-executing enabled the court to provide relief without legislative action. To deny a cause of action under such a provision, according to the court, would be to "negate the will of the people."[68]

In 1979, California clearly accepted *Bivens* in *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*[69] by stating, "The absence

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of the drug LSD to him, without his consent, as part of an army experiment. Justice O'Connor dissented in part in that the conduct alleged was "so far beyond the bounds of human decency" that it could not be considered part of the military mission. *Stanley*, 483 U.S. at 709, 107 S. Ct. at 3065.

63. 487 U.S. 412, 108 S. Ct. 2460 (1988).

64. *Id.* at 423, 108 S. Ct. at 2468.

65. *See* Nichol, *supra* note 3, at 1121. *See also* Friesen, *supra* note 1 and W. Lee Hargrave, *Louisiana Constitutional Law*, 38 La. L. Rev. 438 (1988).

66. 408 So. 2d 711 (Fla. Dist. Ct. App. 1982), approved by Schreiner v. McKenzie Tank Lines, Inc., 432 So. 2d 567 (Fla. 1983).

67. *Schreiner*, 408 So. 2d at 714 (citing Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960)).

68. *Id.*

69. 595 P.2d 592 (Cal. 1979).

of . . . an administrative remedy, however, provides no justification for the judiciary to fail to enforce individual rights under the state Constitution."[70] In *King v. Alaska State Housing Authority*,[71] the Alaska Supreme Court accepted a *Bivens* action through its constitutional provision article I, section 7,[72] but denied recovery based on the existence of special policy considerations and the inappropriateness of money damages. An Illinois appellate court in *Walinski v. Morrison & Morrison*[73] found a private cause of action under Illinois' Constitution article I, section 17 by examining the text and the legislative history. The provision expressly allows enforcement "without action by the General Assembly"[74] to provide "recourse to existing judicial or legislative remedies."[75]

As mentioned earlier, historical reasoning was used in *Widgeon v. Eastern Shore Hospital Center*[76] to grant authority to the court. The

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70. *Id.* at 602 n.10. For other state decisions granting a cause of action in their state constitutions, *see also* Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984) (court assumed the existence of a *Bivens* action, but dismissed the claim because defendant was a private party); King v. Alaska St. Hous. Auth., 633 P.2d 256 (Alaska 1981); Walinski v. Morrison & Morrison, 377 N.E.2d 242 (Ill. App. Ct. 1978) (court examined the text and history of the state constitution); Newell v. City of Elgin, 340 N.E.2d 344 (Ill. App. Ct. 1976); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984) (court's reasoning was similar to *Moresi* in that it noted the similarities in the state provision to the amendments used by the U.S. Supreme Court to grant a cause of action); Phillips v. Youth Dev. Program, Inc., 459 N.E.2d 453 (Mass. 1983); Smith v. Department of Public Health, 410 N.W.2d 749 (Mich. 1987), *aff'd sub nom.* Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S. Ct. 2304 (1989) (text, history, previous interpretations, and the degree of specificity were among the considerations of the court in granting a cause of action under the state constitution); 77th Dist. Judge v. State, 438 N.W.2d 333 (Mich. Ct. App. 1989); Rockhouse Mountain Property Owners Ass'n, Inc. v. Town of Conway, 503 A.2d 1385 (N.H. 1986) (recognized *Bivens*, but said remedy was inappropriate for equal protection claim); Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 465 (N.J. 1978) (court stated that the legislature could not curtail constitutional rights through its silence and that it was the judiciary's obligation to protect the fundamental rights of individuals); Cooper v. Nutley Sun Printing Co., 175 A.2d 639 (N.J. 1961); Lloyd v. Borough of Stone Harbor, 432 A.2d 572 (Ch. Div. 1981); Hunter v. Port Auth., 419 A.2d 631 (Pa. 1980); Nelson v. Lane County, 720 P.2d 1291 (Or. App. 1986), *aff'd*, 743 P.2d 692 (Or. 1987).

71. 633 P.2d 256 (Alaska 1981).

72. *Id.* Alaska Const. art. I, § 7 states: "No person shall be deprived of life, liberty or property without due process of law. The right of all persons to fair and just treatment in the court of legislative and executive investigations shall not be infringed."

73. 377 N.E.2d 242 (Ill. App. Ct. 1978).

74. *Id.* at 243. Ill. Const. art. I, § 17 (1978) states: "All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of an employer or in the sale or rental of property. These rights are enforceable without action by the General Assembly . . . ."

75. *Walinski*, 377 N.E.2d at 244 (citing VI Committee Proposals—Record of Proceedings of the Sixth Illinois Constitutional Convention 69 (May 22, 1970)).

76. 479 A.2d 921 (Md. 1984); *see supra* text accompanying notes 50-52.

Maryland court of appeal compared its articles to certain provisions of the Magna Carta, a violation of which would generally give rise to an action in damages. The court also reasoned that its state provisions were analogous to the Fourth, Fifth, and Eighth amendments of the federal Constitution, under which individuals had been granted a private cause of action.[77]

B. Implying the Action in Louisiana

In *Moresi*, Justice Dennis cited the textual formula of article I, section 5, the history of the provision, and its similarity to the Fourth Amendment as authority for granting a private cause of action under the Louisiana Constitution. The Louisiana court also drew support from the several states already recognizing an individual's right to seek damages for a violation of his rights guaranteed in the respective state constitutions.[78] Aside from this reasoning, there are other arguments favoring such actions.

First, the premise asserted in *Bivens* and *Bell*—that a constitution creates substantive rights, that such rights imply a remedy, and that the court must enforce those rights—is equally true with regard to a state constitution. This is particularly true when the self-executing nature of a provision, such as article I, section 5, is taken into account.[79] Also, the argument asserted in *Borak* that the provision or statute must be given effect through enforcement by the court in private causes of action can apply to provisions such as those in article I, section 5, where the individual rights granted therein would be largely ineffective without some form of private remedy.

In *Eiche v. Louisiana Board of Elementary and Secondary Education (BESE)*,[80] the Louisiana Supreme Court distinguished self-executing provisions from those that require legislative action by finding that article VIII, section 3(a) was not self-executing. The provision creates BESE and states that BESE "shall supervise and control the public elementary and secondary schools, vocational-technical training and special schools under its jurisdiction and shall have budgetary responsibility for all funds appropriated or allocated by the state for those schools, as provided by law."[81] According to the court, the phrase "as provided by law" indicated that BESE's powers were dependent on laws passed by the legislature.[82] Constitutional provisions commonly contain phrases

77. *Id.* at 927 (citing Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264 (1979)). *See also* Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468 (1988).

78. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092 (La. 1990).

79. *See supra* note 65.

80. 582 So. 2d 186 (La. 1991).

81. La. Const. art. VIII, § 3(a). *See also Eiche*, 582 So. 2d at 189.

82. *Eiche*, 582 So. 2d at 189.

such as "as provided by law" and "the legislature shall enact laws to implement." Such provisions would seem to be ineffective without action by the legislature. For example, Article IX, section 1 of the Louisiana Constitution expressly mandates action by the legislature in order to implement environmental provisions.[83]

On the other hand, a provision lacking such an explicit need for legislation is effective on its own. This is the self-executing provision discussed earlier with respect to other state decisions. "[The ideal] constitution would contain only self-executing provisions that are judicially enforceable and have a clear effect without the necessity for legislation to implement them."[84] Article I, section 5 provides guarantees to the individual and contains no requirement for legislative action before it can be enforced. This indicates that its protections are self-executing and can be enforced by the judiciary despite the silence of the legislature. Other such provisions in article I of the Louisiana Constitution include section 4, which is the right to acquire, own, control, and enjoy private property; section 10, which grants the right to vote; and section 12, which ensures access to public areas free from discrimination. Each of these provisions seems to provide, logically, an affirmative right to individuals through the constitution, just as article I, section 5 does.

C. *Criticisms of the Doctrine*

Despite the apparent exuberance on the part of a growing number of states, *Bivens* actions have not been adopted without criticism. Justices Blackmun and Black addressed some of the biggest criticisms of the constitutional tort in their dissents in *Bivens*. In practical terms, both Blackmun and Black feared an onslaught of frivolous lawsuits against federal officials as a result of the majority's opinion.[85] Justice Black asserted that the "task of evaluating the pros and cons of creating judicial remedies . . . [was] a matter for Congress and the legislatures of the states."[86] As discussed above, the current majority has begun to follow that argument more frequently when addressing implied causes

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83. *See* Hargrave, *supra* note 65, at 441-42.

84. *Id.*

85. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 429-30, 91 S. Ct. 1999, 2020-21 (1971) (Black, J., and Blackman, J., each dissenting). Blackmun wrote that the majority's decision "opens the door for another avalanche of new federal cases. Whenever a suspect imagines, or chooses to assert, that a fourth amendment right has been violated, he will now immediately sue the federal officer in federal court." *Id.* at 430, 99 S. Ct. at 2021. Black wrote: "The courts of the United States as well as those of the States are choked with lawsuits. The number of cases on the docket of this Court have reached an unprecedented volume in recent years." *Id.* at 428, 99 S. Ct. at 2020.

86. *Id.* at 429, 91 S. Ct. at 2021 (Black, J., dissenting).

of action.[87] Justice Black also construed the silence of Congress with regard to actions against federal officials, in light of Congress' creation of an action against state officials through § 1983, as a congressional desire to prevent such lawsuits.[88] Clearly, the dissenting justices in *Bivens* believed the majority overreached its authority by creating a private cause of action without any Congressional authorization.

The practical concerns of the dissenters in *Bivens*, that an "avalanche of new federal cases" would result from the holding, has been largely proven true. In the ten years following the decision, over 12,000 suits were filed as *Bivens* actions. Fifteen years after *Bivens*, roughly one out of every 300 federal officials was named as a defendant in a pending *Bivens* action, and over 2600 suits involving over 10,000 present and former federal officials were filed.[89] A great number of these claims are made by criminal defendants bringing a *Bivens* suit as a defense. The cause of action is asserted in an attempt to use it as leverage in the case, assuming a federal official might contemplate dismissing the suit to avoid exposure to personal liability.[90] But despite the argument that *Bivens* has brought about an "avalanche" of cases, it has not resulted in a dramatic increase in government officials' exposure to personal liability. For despite the large number of suits brought against government actors, few actually go to trial. For example, of the 12,000 claims previously mentioned, only thirty resulted in judgments for the plaintiffs.[91]

Besides, the large number of claims should not be a reason to deny the cause of action. The mere grant of a right to bring the action does not mean the alleged victim will be successful. Also, the fact that meritless claims will be brought does not mean there are no real constitutional violations, the victims of which deserve compensation. *Moresi* and *Bivens* merely provide those alleged victims the chance to be heard, and the courts must decide the claims on the merits.[92] That problem must be resolved not by eliminating the cause of action, but rather by defining it clearly to avoid the "avalanche" of claims.

Another concern of critics has been the inhibiting effect *Bivens* actions may have on officials acting in the course of their duties. The constitutional tort exposes officials to personal liability which could hinder the government's enforcement procedures. As a result of this

87. *See supra* text accompanying notes 59-64.

88. *Bivens*, 403 U.S. at 428, 99 S. Ct. at 2020.

89. *See* Rosen, *supra* note 3, at 343 nn.40-42.

90. *Id.* at 344.

91. *Id.*

92. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 456 F.2d 1339 (2d Cir. 1972). On remand, the Second Circuit found no immunity to protect the agents from damage suits, but recognized a defense of good faith and reasonable belief in the agents' action.

concern, courts have tried to balance protecting the rights of individuals and ensuring the proper functioning of the government.[93] The inhibitory effect of such claims is minimal at most, considering that the courts' balance usually tips in favor of the government actor.[94] Once again, the best way to combat this criticism is not to eliminate the right of action but rather to develop a rule of conduct for officials by developing clearly established tests through judicial decisions or, perhaps more effectively, developing guidelines through legislatively-created causes of action.

A final criticism comes from those who initially applauded the creation of a constitutional tort, but who are now looking for alternatives. The doctrine of *Bivens* has been so weakened by the reluctance of judges and juries to hold officials personally liable for actions taken pursuant to their government employment that the purpose of the constitutional tort has been largely unfulfilled.[95] Justice Brennan's own escape clause for cases involving "special factors counselling hesitation,"[96] and the willingness of the judiciary to defer to "alternative remedies" created by the legislatures,[97] have seriously weakened the doctrine.

The "special factors" analysis is broad and unprincipled, allowing the courts to create exceptions without much explanation. The most common "special factor" cited by the U.S. Supreme Court is qualified immunity,[98] but other exceptions have included non-citizenship of the victim[99] and activity that is incidental to service in the military.[100] States generally have applied the exception based on the immunity of the official, but other considerations have included the separation of powers[101] and the prevention of endless lawsuits brought under the constitution.[102] Unfortunately, state courts have applied without much discussion the "special factors" exception to cases involving their state constitutions in almost identical fashion as the federal courts in applying the federal Constitution. But state courts must keep in mind that the U.S. Supreme Court has held state constitutions to be an independent source of protection, and state courts are not bound by the federal courts' methods

93. *See* Rosen, *supra* note 3, at 338.
94. *See* Nichol, *supra* note 3; Rosen, *supra* note 3.
95. *See* Rosen, *supra* note 3.
96. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396, 91 S. Ct. 1999, 2005 (1971).
97. *See* Nichol, *supra* note 3, at 1124.
98. *See* Friesen, *supra* note 1, at 1273.
99. United States v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056 (1990).
100. United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054 (1987).
101. Vest v. Schafer, 757 P.2d 588 (Alaska 1988).
102. King v. Alaska St. Hous. Auth., 633 P.2d 256 (Alaska 1981).

of interpreting constitutional guarantees.[103] If the grant of a cause of action would threaten the ability of another governmental body to perform its authorized functions, then the court should recognize a "special factor." Otherwise, the clause should not be used by the courts to escape difficult decisions.

The exception for "alternative remedies" is just as broad, being applied regardless of whether the alternative provides actual relief to the injured party. Increasingly, the U.S. Supreme Court has placed strong importance on congressional inaction as some form of policy determination in deciding whether the Court's power should be exercised.[104] States too are guilty of finding "alternative remedies" that in fact provide no actual relief.[105] But the remedy should be fundamentally fair and actually redress the injury before a constitutional tort is rejected. In *Monroe v. Pape*,[106] the Supreme Court held that § 1983 was supplemental to all other remedies and that the other state remedies did not have to be sought before a cause of action under the statute would exist. One of the primary concerns in drafting § 1983, according to the Court in *Monroe*, was the unavailability of other remedies in practice.[107] States should approach actions under their own constitutions in the same manner. They should consider not whether there is another avenue for redress for the particular plaintiff, but rather whether the plaintiff will be granted actual relief which is fair and appropriate.

IV. Questioning the State Action Limit

A. *Development of the "State Actor" Limit*

In holding that a constitutional tort existed as a cause of action under the Louisiana Constitution, the Louisiana Supreme Court in *Moresi* also stated in dicta that the state right to privacy provision[108] provided protection against private actors. This was a definite departure from the traditional limitation of both the federal and state constitutional prohibitions to "state actors." This traditional limitation finds its origins

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103. Robins v. PruneYard Shopping Ctr., 592 P.2d 341 (Cal. 1979), *aff'd*, PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).

104. Schweiker v. Chilicky, 487 U.S. 412, 108 S. Ct. 2460 (1988).

105. In Cooney v. Park City, 792 P.2d 1287, 1298 n.7 (Wyo. 1990), the court stated that criminal prosecution and disciplinary actions against an official provided an alternative remedy. However, the official in question had been unaffected by the alternative remedy and remained a member of the bar.

106. 365 U.S. 167, 81 S. Ct. 473 (1961).

107. *Id.* at 174, 81 S. Ct. at 477.

108. *See* La. Const. art. I, § 5. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092 (1990).

in the context of the U.S. Constitution. In *Virginia v. Rives*,[109] it was made clear that government action was the only action protected against by the federal Constitution. Encroachments by private actors, it was believed, were protected by the common law.[110] In 1883, the Court in the *Civil Rights Cases*[111] further outlined that distinction by stating:

> The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party . . .; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may be presumably vindicated by resort to the laws of the state for redress.[112]

However, the distinction between "state action" and private conduct became increasingly unclear in the Warren era through a broader definition of the "state action" concept.[113] For example, monopolies granted by the state, closely-regulated businesses, and entities substantially influenced by the state were defined as "state actors" regarding constitutional torts.[114] On the national level today, "it is clear that private parties are subject to federal constitutional restraint . . . if they are directly influenced by, act in concert with or stand in place of some government act or official."[115]

One primary reason for the continued watering down of the "state action" limit is the growth of economic and political power in the hands of private individuals that is not the result of influence from or coordination with the national or state governments. Employers and landlords, among others, possess significant economic power which can and

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109. 100 U.S. 313 (1879).

110. *Id.*

111. 109 U.S. 3, 3 S. Ct. 18 (1883).

112. *Id.* at 17, 3 S. Ct. at 25-26.

113. A narrow view of what constituted "state action" remained in force until the 1940s, but then the Court began to broaden the concept which resulted in various acts of private persons being attributed to the states. Two theories upon which this broad definition was based are: (1) the actor is fulfilling a public function or something that is governmental in nature, or (2) the connection or nexus between the state and the private actor are so great that the state can be said to be involved in the activity.

114. Some cases involving the "public function" rationale include: Evans v. Newton, 382 U.S. 296, 86 S. Ct. 486 (1966) (a park in Macon, Ga. was "municipal in nature"); Marsh v. Alabama, 326 U.S. 501, 66 S. Ct. 276 (1946) (involving a company town); and Smith v. Allwright, 321 U.S. 649, 64 S. Ct. 757 (1944). Cases involving the "nexus" theory include: Burton v. Wilmington Parking Auth., 365 U.S. 715, 81 S. Ct. 856 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972) (involving a state liquor license); Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627 (1967).

115. *See* Devlin, *supra* note 10, at 822 n.8.

will be used to prevent unwanted speech, to invade an individual's privacy, or to deny equality of opportunity.[116] This concentrated private power, which is often totally unrelated to governmental authority, can threaten the fundamental values enumerated in constitutions in a way similar to the threats posed by government that the framers of the Constitution were concerned about in 1787. Therefore, if personal constitutional rights are to be fully protected, the "state action" doctrine must be dramatically eroded.

B. State Expansion

Presently, there appears to be a movement favoring a further relaxation of the "state action" limit on the state level. Commentators have gone so far as to demand total elimination of the concept, asking "why infringements of the most basic values—speech, privacy and equality—should be tolerated just because the violator is a private entity."[117] The division, commentators argue, should be made by focusing on the content of the liberties, not the identity of the actors.[118] These arguments have been somewhat successful on the state constitutional level where a few state courts have essentially read the "state action" requirement out of particular provisions of their respective state constitutions or have done so practically by broadening their definitions of "state actor."[119]

California has been one of the foremost states adopting an alternative to the "state action" limit of the federal Constitution for its own constitution. The principal case from California, *PruneYard Shopping Center v. Robins*,[120] led to the U.S. Supreme Court's affirmance of the state court's decision to abandon the threshold requirement of state action for claims arising under its constitution. In that case, high school students were not allowed to set up a table at the PruneYard Shopping Center to solicit signatures for a petition opposing a United Nations anti-Zionism resolution.

In holding that the state constitution guaranteed a right of access for individuals to exercise their rights of free speech and petitioning, the California Supreme Court decided it was not intended by the state constitutional provisions to protect the individual in the use of his property to such an extent as to enable him to use it to the detriment of society.[121] Although the California decision was limited to large shop-

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116. *Id.* at 883-902.

117. *See* Chemerinsky, *supra* note 2, at 505.

118. *Id.*

119. *See, e.g., infra* note 124.

120. 447 U.S. 74, 100 S. Ct. 2035 (1980).

121. Robins v. PruneYard Shopping Ct., 592 P.2d 341 (Cal. 1979), *aff'd sub nom.* 447 U.S. 74, 100 S. Ct. 2035 (1980).

ping centers, the case made clear that courts could definitely interpret state constitutions to grant greater protection of individual rights than the U.S. Constitution.[122]

Since that time, state courts have applied constitutional protections against such private entities as shopping centers,[123] universities,[124] and utilities.[125] In *Batchelder v. Allied Stores International*,[126] the court ruled that Massachusetts Constitution Part 1, article 9, which states that "[a]ll elections ought to be free; and all the inhabitants of this commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments,"[127] did not require state action by regarding as "meaningful the absence of state action language" in the provision.[128] In so holding, the court upheld Batchelder's right to solicit signatures at a shopping center. Also, the California Supreme Court said a state-protected public utility could not claim the prerogatives of private autonomy to avoid responsibility in *Gay Law Students Association*.[129] Although the court rejected the theory that the provision at issue applied to all private conduct, it held that the utility was liable by finding that the monopoly position of the utility and the substantial state regulation "inextricably tie[d]" the state to the utility.[130]

Also, in *Alderwood Association v. Washington Environmental Council*,[131] the Washington Supreme Court recognized the reasoning of *PruneYard* which offered protection for the rights of individuals to speak or petition on privately-owned property as long as they did not interfere unreasonably with the constitutional rights of the property owner. In *State v. Schmid*,[132] the New Jersey Supreme Court overturned the defendant's conviction for trespass on a private university and held:

> [T]he state constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to

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122. *See* Devlin, *supra* note 10, at 820.
123. Batchelder v. Allied Stores Int'l, 445 N.E.2d 590 (Mass. 1983).
124. Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 465 (N.J. 1978).
125. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979).
126. 445 N.E.2d 590 (Mass. 1983).
127. Mass. Const. Pt. 1, art. 9.
128. *Batchelder*, 445 N.E.2d at 593.
129. *Gay Law Students Ass'n*, 595 P.2d 592.
130. *Id.* at 599.
131. 635 P.2d 108 (Wash. 1981), *overruled sub nom.* Southcenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282 (Wash. 1982).
132. 423 A.2d 615 (N.J. 1980).

> government entities as well as to persons exercising government powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms.[133]

C. Moresi *and the State Actor Limitation*

Justice Dennis based his statement in *Moresi* that the Louisiana Constitution does not merely apply to "state action" on the express language of article I, section 5. While this portion of the opinion was merely dicta, it signifies a tremendous step forward for advocates of individual rights. In just one sentence, Justice Dennis indicated the direction the court may take regarding application of article I, section 5: "[T]he expression 'no law shall' was not used, indicating that the protection goes beyond limiting state action."[134] Besides a few exceptions,[135] most of the provisions in Louisiana's Declaration of Rights contain the phrase "no law shall" which expressly limits its application to government actors. Under Justice Dennis' reasoning, all those exceptions, including article I, section 5, may be construed to provide affirmative rights for individuals to be protected from both private and governmental actors.[136]

During the debates of the Constitutional Convention of 1973, the possibility of article I, section 5 providing protection from private as well as state action was mentioned, but not resolved.[137] It is clear that the text of the provision allows, but does not require, an interpretation that applies to conduct of private parties. It is also equally as clear

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133. *Id.* at 628. Also, in Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970), where the defendant asserted his right to a jury trial for violation of a city ordinance, the Alaska court said the court was free and under a duty to develop additional constitutional rights and protections if the protections are found to be within the "intention and spirit of [the] local constitutional language." This reasoning was further discussed in *Schmid*, 423 A.2d at 626-27, when the court said that "a basis for finding exceptional vitality . . . with respect to individual rights . . . is found in part in the language employed."

134. Moresi v. Department of Wildlife & Fisheries, 567 So. 2d 1081, 1092 (La. 1990).

135. *See supra* text accompanying notes 78-84.

136. *See supra* note 7.

137. Connell L. Archey, Comment, *The Status of Private Searches Under the Louisiana Constitution of 1974*, 49 La. L. Rev. 873, 876 (1989). During the convention debate on what is now article I, section 5, it was pointed out that the provision could apply to private as well as state action. *See also* Records of the Louisiana Constitutional Convention of 1973: Transcripts, Vol. VI, August 31, 1973, at 1076. The issue was never resolved and some years later a co-author of the Declaration of Rights wrote that "[t]he section is intended to apply solely to government action." Woody Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 28 (1975). *See also* Hargrave, *supra* note 44.

that the text and history of article I, section 5 do not provide an answer to the question of whether or not it should be interpreted in such a way.[138] This has left the debate—at least until such an answer is provided by the legislators—to the courts.

In 1978, the Louisiana Supreme Court expressed some willingness to offer article I, section 5 protections against private actors in *State v. Nelson*.[139] In that case, private security guards conducted a search of a suspected shoplifter based on the authority vested in Louisiana Code of Criminal Procedure article 215, the shoplifter statute.[140] The evidence obtained through the search was excluded after the court found the guards' conduct to be unreasonable and beyond the authority of the statute. Justice Tate stated, "[T]he state cannot use an involuntary admission of culpability by the defendant, *however and by whomever obtained*, as evidence of the accused's guilt."[141] His statement implies that the protections of the state constitution were enforceable against private actors as well as those actors within the authority of the state. Justice Tate stated that the court was resting its ruling on the unreasonableness of the search, but by discussing the reasonableness of a search conducted by "semi-private" actors the court has "tacitly affirmed that article 1, section 5 does prohibit unreasonable searches by private persons."[142]

As the facts of *Nelson* illustrate, the interpretation of prohibitions such as those found in article I, section 5 to include the conduct of private actors is justified and reasonable. When private actors are placed in positions of authority, such as the guards in *Nelson*, or when private citizens possess extreme power and control over other individuals based on their wealth or position in society, it no longer seems rational to distinguish them from persons acting under authority of the state. In *Bivens*, Justice Brennan discussed the disparity between state actors and private citizens in granting a remedy under the Fourth Amendment.[143]

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138. The court's discussion of the reasonableness of private searches implies that the protections of article I, Section 5 apply to those private searches, but in State v. Wilkerson, 367 So. 2d 319, 321 (La. 1979), the court stated: "[T]his court has yet to decide whether Article 1, section 5 of the Louisiana Constitution bans unreasonable searches by private citizens as well as police."

139. 354 So. 2d 540 (La. 1978).

140. Article 215 states in part:

> A peace officer, merchant, or a specifically authorized employee or agent of a merchant, may use reasonable force to detain a person for questioning on the merchant's premises, for a length of time, not to exceed sixty minutes, unless it is reasonable under the circumstances that the person be detained longer . . . .

La. Code Crim. P. art. 215.

141. *Nelson*, 354 So. 2d at 542 (emphasis added).

142. *See* Archey, *supra* note 137, at 883.

143. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 392, 91 S. Ct. 1999, 2002 (1971).

When that same disparity exists between private parties, the policy behind the *Bivens* decision should apply equally. Therefore, constitutional provisions, such as article I, section 5, should require the same remedial measures for private party violations as it does when the violating party happens to be a state actor.

D. Criticism of Expansion

A major objection to elimination of the "state action" limit is that without it courts seeking to vindicate the rights of one party might infringe on important rights or liberties of the other private parties involved.[144] In *Alaska Pacific Assurance Co. v. Brown*,[145] the Alaska Supreme Court began its inquiry by determining what weight to place on the constitutional interest impaired by the challenged act. Depending on the primacy of that interest, the court said the complainant will have a greater or lesser burden of proof in order to bring a successful claim. A similar balance can be used in application of article I, section 5, which requires that a search, seizure, or invasion of privacy be *unreasonable* before it will merit constitutional protection by the court. For example, when an employer searches an employee's locker at work based on the employer's suspicion of alcohol or drug use by the employee during work, the court can take into account the type of work involved and whether or not society is put at risk by possible alcohol or drug use. If the employee is operating heavy machinery or is responsible for the care of others, the court is more likely to find the search reasonable. Also, the court can consider the diminished privacy expectations of an employee in an on-site locker. For instance, the outcome would be different if the employer searched the employee's car or home for evidence of alcohol or drug use. "[T]he courts are given flexibility to determine which invasions of privacy are supported by societal interests to be considered reasonable. In this inquiry, the courts are guided by the purpose of the convention in expanding the individual's protections in this area beyond the existing law."[146]

Another criticism of the elimination of the "state actor" limit, as well as of the *Bivens* action as mentioned above,[147] is the "avalanche" of cases that might result from such expansions. The constitution would not only provide a private remedy for violations of the constitution, but its restrictions would be imposed on private relations as well. But the courts have already begun to develop limits on these types of claims. For example, many claims are denied for lack of standing or the in-

144. *See* Devlin, *supra* note 10, at 872.
145. 687 P.2d 264 (Alaska 1984).
146. *See* Hargrave, *supra* note 44, at 21.
147. *See supra* text accompanying notes 84-92.

appropriateness of a damages remedy. In *Rockhouse Mountain Property Owners Association, Inc. v. Town of Conway*,[148] the New Hampshire Supreme Court held that damages were an inappropriate remedy for a property owner's claim that the defendant's refusal to lay out certain roads infringed on his rights to equal protection under the state constitution. The court held that the right should be recognized and deserved vindication through the law, but because the nature of equal protection claims was the contrast of treatment between the plaintiff and others rather than an injury from a particular act, damages would be inappropriate. The court pointed out that "[t]here is . . . virtually no limit to the variety of activities that can provide . . . an equal protection claim."[149] One factor considered by the court was that the injury was not such that it could not be redressed by the judiciary, in which case damages might be appropriate.[150]

Critics also urge that any abandonment or weakening of the "state action" limit will violate the traditional understanding of the purpose of the constitution and will represent a "slippery slope likely to lead to inappropriate imposition of constitutional restraints on a broad range of private relations."[151] Opponents say that abandonment of the requirement is antidemocratic and allows the judiciary to involve itself in traditionally legislative functions which ultimately gives too much power to unrepresentative courts.[152] But the importance of protecting individual liberties is at least equal to (if it does not outweigh) the concerns for structure in the separation of powers doctrine and the importance of allocating power among the branches.[153] Also, the electorate retains significant democratic power over the court in many states.[154] Finally, as seen in those states adopting statutory protections against constitutional violations, the legislature retains the ultimate power to limit and structure remedies for individual rights.[155]

V. RECOMMENDATIONS

A. A Legislative Solution

As the previous discussion indicates, the Louisiana Supreme Court has the authority to recognize a constitutional tort as it did in *Moresi*,

148. 503 A.2d 1385 (N.H. 1986).
149. *Id.* at 1388.
150. *Id.*
151. *See* Devlin, *supra* note 10, at 860.
152. *See* Friesen, *supra* note 10, at 116.
153. *See* Chemerinsky, *supra* note 2, at 552-53.
154. *See* Friesen, *supra* note 10, at 116-17. Also, *see infra* notes 157-160 and accompanying text for states adopting statutory protection of constitutional rights.
155. *Id.*

as well as the power to extend that remedy against private actors.[156] By holding that such a cause of action exists under article I, section 5 of the Louisiana Constitution, the supreme court expressed its belief that individual rights deserve protection and its willingness to provide such protection when those rights have been violated.

However, there is a more practical and appropriate way to enforce the state constitution's protections. Considering the current conservative approach of the U.S. Supreme Court and the tendency of many state courts to summarily adopt that approach, along with the extreme disparity of individual power and wealth in today's society, a legislatively-created cause of action for the violation of a constitutional right would lead to a more consistent and effective application of the *Bivens* doctrine. The legislature is the more appropriate body to create such a cause of action because it can define its limits through public debate, and those limits will exist prior to the conduct that could possibly bring about an action. A legislatively-created cause of action will eliminate much of the criticism of cases like *Bivens* and *Moresi*. Those actors governed by the statutes can model their conduct according to the law to avoid liability. The elements of the cause of action can be provided in the text of the statute to better limit the number of cases and avoid meritless claims. Also, courts will be less likely to dismiss a claim for "special factors" when there is a mandate from the state legislature for such a cause of action. By using a statute to expand the constitutional protections to limit private conduct, the legislature would bypass the process of developing guidelines for the doctrine in the courtroom.

Massachusetts, in response to a growing number of violent incidents of racial harassment, adopted the Massachusetts Civil Rights Act ("MCRA") in 1979, often called "little 1983."[157] The MCRA grants a cause of action securing the rights provided under the state constitution against both government and private actors. It also grants costs and attorneys' fees to successful plaintiffs. By enacting the MCRA, the

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156. *See supra* text accompanying notes 78-84.

157. Massachusetts Civil Rights Act, ch. 12, §§ 11-H to -I (1988). Section H provides:

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.

Section I allows actions by private citizens.

legislature provided an appropriate remedy for specific constitutional violations and limited the scope of the cause of action through the text of the statute. For example, the requirement that the infringement be through "threats, intimidation and coercion" allows courts to narrowly define the type of conduct giving rise to a claim. The phrasing tends to limit the action to situations where there is a disparity of power or control between the parties. California and Maine have adopted statutes similar to the MCRA.[158] Until 1990, Utah granted a cause of action for state constitutional violations that limited its application to "victims of peace officers' violations of so-called 'fourth amendment rights.'"[159] Nebraska holds persons liable for subjecting another to the deprivation of constitutional rights.[160]

In enacting a statute that grants a cause of action for violations of a guarantee of the state constitution, legislators must provide express limits or guidelines in the text of the statute, or the statute will face the same problems that arise from a judicially-created cause of action. As discussed above, the use of precise language, such as the "threats, intimidation and coercion" language used in the text of the MCRA, can limit the conduct that will be actionable. Also, a specific reference to the right being protected by the statute, as provided by the 1982 Utah statute, will further limit its application. By using these approaches in constructing a statute, the Louisiana Legislature could provide rules of law that can be directly applied by courts and a rule of conduct that can be followed by both private and state actors.[161]

B. Until Then . . .

That a statutory cause of action would be the optimal approach to securing the protections of article I, section 5 does not mean, however,

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158. Cal. Civ. Code § 52.1 (West 1987); Maine Rev. Stat. Ann., tit. 5, § 4681 (1989).

159. *See* Friesen, *supra* note 1, at 1287. 1982 Utah Laws Ch. 10, §§ 5-8 (repealed by 1990 Utah Laws Ch. 15, § 4). The statute also provided for a waiver of sovereign immunity, a minimum of $100 attorney's fees, and additional actual and punitive damages. The remedy was in lieu of exclusion of evidence except when the officers were not in good faith. The statute was repealed in 1990 because the Utah Supreme Court, in State v. Mendoza, 748 P.2d 181, 185 (Utah 1987), declared its provisions creating a good faith exception to investigatory stops and searches unconstitutional.

160. Neb. Rev. Stat. § 20-148 (1987).

161. Such a statute could be phrased:

> Any person, whether or not acting under color of state law, that interferes by unreasonable threats, intimidation or coercion, or that attempts to interfere by unreasonable threats, intimidation or coercion with a person's exercise or enjoyment of rights secured by the constitution or laws of the United States or the constitution or laws of Louisiana shall be liable to the party injured as a result of that conduct.

that *Moresi* was a mistake. The possibility of a better approach does not relieve the courts of their obligation to give meaning to the protections of the constitution. Until such alternative is created and is shown to actually provide redress for the victim of a constitutional violation, judicial enforcement is the best method. The rights and values of the constitution exist today; the cause of action to protect them cannot wait for an alternative, "better" approach from the legislative body.

In order to avoid the "avalanche" of litigation which could result from recognizing the constitutional tort, the judiciary can limit the number of claims by defining the types of constitutional violations that give rise to a *Bivens* claim. Once the courts accept the existence of a constitutional tort, they can begin to establish elements of the cause of action that will limit the availability of the doctrine and allow officials to adjust their conduct accordingly without interfering with the functions of the government. A basic guideline for courts to use is that the complainant must have some individualized injury to make a claim.[162] It cannot be a generalized complaint about a practice affecting a group of people. The claim must have an injured party and a particular defendant who has violated a clearly established constitutional right.

Also, in order to legitimately provide protection against private infringement, the courts must address the criticisms of the approach and develop guidelines for its application. The most frequent suggestion of commentators favoring this approach is that the court balance the interests and weigh the relevant factors affecting the parties rather than dismiss the action based on the absence of a single threshold requirement of "state action."[163] This would require courts to decide whether the individual rights should be vindicated based on the merits of the claim rather than on the irrelevant question of whether the conduct was that of a state actor. In reaching the merits of the claim, the court must balance the competing rights and impose restraints only when the infringement on fundamental liberties caused by the violation outweighs the imposition of constitutional restraints on the defendant.[164] In *Alaska Pacific Assurance Co. v. Brown*,[165] the court began its analysis by quantifying the various interests at stake. Also, in *Robins v. PruneYard Shopping Center*,[166] the California Supreme Court recognized that rights of an individual are held in subordination to rights of society. The court

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162. Rockhouse Mountain Property Owners Assoc. v. Town of Conway, 503 A.2d 1385 (N.H. 1986).

163. *See* Devlin, *supra* note 10, at 885; Chemerinsky, *supra* note 2, at 506; and William B. Harvey, *Private Restraint of Expressive Freedom: A Post-*PruneYard *Assessment*, 69 B.U. L. Rev. 929, 958 (1989).

164. *See* Devlin, *supra* note 10, at 886.

165. 687 P.2d 264 (Alaska 1984).

166. 592 P.2d 341 (Cal. 1980).

stated in its opinion, which was affirmed by the U.S. Supreme Court,[167] that the interests of society justify restraints upon individuals. "By protecting individual rights, society did not part with the power to protect itself or to promote its general well-being."[168] This reasoning could provide another guideline for courts in enforcing constitutional protections against private individuals. Only those fundamental rights protected by the state constitution whose violation would "shock the conscience"[169] of society or would be substantially adverse to society's expectations will give rise to a private cause of action. This test would not only limit the types of injuries to be redressed, but it would also limit the class of individuals likely to be defendants in such a cause of action. Such a "shock the conscience" requirement will typically limit the class of defendants to those defendants who have such power and ability to cause an extreme injury to a person's right to privacy.

This leads to the final considerations in limiting the application of constitutional restraints on private conduct. Each provision must be examined. Only the most important and fundamental state constitutional rights should justify judicial intervention, and judicial restraint should be practiced even in those cases unless those rights have been violated in some important respect.[170] In using this standard, the courts will answer the question of whether to apply the cause of action separately for each clause, and not generally for the entire constitution. This can be done by reference to the text of the provision and to the history and purpose of the individual clauses of the constitution.[171] Also, the expansion can be limited to prohibitions on those exercising "impersonal power," power that some individuals exercise by reason of wealth, position, or some other factor that allows them to control others.[172] As the California Supreme Court reasoned in *Robins*,[173] only that conduct which is detrimental to society's general welfare will give rise to a cause of action. Normally, only those individuals possessing a great amount of economic or "impersonal" power or power authorized by the government will be able to produce such effects by their actions. Persons acting merely in their private capacities should not be subjected to constitutional restraint. However, when that individual possesses the ability to enforce his opinions and beliefs on a scale analogous to the

167. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).
168. *Robins*, 592 P.2d 341 (Cal. 1980).
169. Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 209 (1952).
170. *See* Devlin, *supra* note 10, at 885.
171. *See* Friesen, *supra* note 10, at 111-12, and *see generally* Hargrave, *supra* note 44.
172. *See* Devlin, *supra* note 10, at 885.
173. 592 P.2d 341 (Cal. 1980).

government's authority, his actions must be similarly limited by the constitution.

Thus, the court's role is an important one. Until the legislature develops a statute providing protection against the "impersonal power" of government and private entities, the courts have an obligation to implement and enforce the protections of the state constitution. Not only does the text of article I, section 5 allow such enforcement by the state courts, but change in the structure of society and distribution of power today, and the limited right to remedies on the federal level, calls the courts to take action in providing meaningful enforcement of the provision. Even if the legislature chooses to establish a framework for applying the protections of article I, section 5, the courts must be careful to give the statute substance and not weaken it by a conservative interpretation.

VI. CONCLUSION

The two approaches to securing individual rights discussed in *Moresi v. Department of Wildlife and Fisheries* have been criticized by many as an overreaching of judicial power that will open the floodgates to countless claims. But Louisiana, as well as other states adopting similar approaches to their own constitution, must not collapse under the criticism. Any objection to the constitutional tort and the elimination of the "state action" limit must be balanced against the strong textual and theoretical arguments supporting them, as well as the necessitous special circumstances that face today's society. Such a balance illustrates the ability of the state courts to act and the importance of their striving to do so in order to provide real rights and adequate remedies for individuals whose rights have been infringed. *Moresi* is the first step for Louisiana.

The text of article I, section 5 and the history behind the Louisiana Constitution, along with the constitutions of the several other states adopting these approaches, create the opportunity for the courts to provide greater protections for individual rights than does the federal Constitution. In *Moresi*, Justice Dennis said that by its clear terms and by its placement in the Declaration of Rights, article I, section 5 established an affirmative right to privacy that extends to non-criminal cases. Once it found the private cause of action under the constitution, the court asserted that damages always have been regarded as the appropriate remedy, thus the *Bivens* action was adopted. Also, the absence of "no law shall" in the provision tends to indicate there is no "state action" limit on the guarantee; rather, the rights are protected against everyone.

In addition to the doctrinal arguments above, there are practical necessities for *Moresi*. Government and private entities have increasing

power over individuals. While "state actors" concededly must be limited in the exercise of their authority to carry out governmental objectives, many private actors today require the same limits. Economic strength and governmental authorization have provided private entities with the same unequal share of power that the Court in Bivens cited as a factor in creating the necessity for a private cause of action against government officials. The possibility of expanding constitutional protections has been asserted throughout the ages. The authors of the Bill of Rights and the several state constitutions knew society was changing constantly and the law should be adapted accordingly.[174] Both the legal climate of our nation, with an increasingly conservative approach to the federal protections, and the economic realities previously discussed demand that state courts address those rights guaranteed in their own constitutions and provide real protection against both state and private actors.

The rights enumerated in our state constitutions require enforcement and implementation by the courts, or the rights, in practical effect, do not exist. *Moresi* offers Louisiana courts an opportunity to put meaning behind the words of the Declaration of Rights by securing the adoption of a *Bivens* type of action and establishing a clear and just approach to providing those causes of action to individuals whose rights have been infringed upon by private actors. While it can be asserted that such causes of action are best left for the legislature to develop, as in the Massachusetts Civil Rights Act,[175] it cannot be said that those rights "guaranteed" in the constitution cease to exist until the legislature expressly creates the causes of action. The courts are obligated to implement the constitution and have a moral duty to ensure that the cherished rights granted therein to the citizens of the state are upheld. *Moresi* is the first indication that the Louisiana courts are willing to accept that duty.

Mindy L. McNew

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174. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980); McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

175. *See supra* note 154.